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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE RICHARD AND SHEILA J. McKNIGHT 2000 FAMILY TRUST, Richard McKnight Trustee, Plaintiff, v. WILLIAM J. BARKETT, an individual, CASTAIC III PARTNERS, LLC, a California limited liability company, Defendants.	CASE NO. CV-S-10-1617 **OPPOSITION TO DACA-CASTAIC, LLC AND DEBT ACQUISITION COMPANY OF AMERICA V, LLC'S MOTION FOR:** **1) DEFAULT JUDGMENT ON DACA'S COUNTERCLAIM** **2) SUMMARY JUDGMENT ON DACA'S SUPPLEMENTAL AND FOURTH PARTY COMPLAINTS; AND** **3) SUMMARY JUDGMENT DENYING RELIEF ON THIRD PARTY COMPLAINT AND COUNTERCLAIM OF WILLIAM BARKETT, ET AL.**
AND RELATED INTERVENOR ACTIONS AND RELATED CROSS ACTION	

I.

INTRODUCTION

In or about 2005, loans were made to entities known as Castaic

Partners, LLC, Castaic Partners II, LLC, and Castaic Partners III, LLC ("Castaic Partners") for those entities to acquire land in Los Angeles County near Castaic ("Castaic Loans"). The land, approximately 1,100 acres, was purchased in separate transactions, but for the purpose of a single development often referred to as Tapia Ranch. The loans were arranged by an entity known as U.S.A. Commercial Mortgage ("USACM"), a company not licensed to do business in California. What USACM did was solicit investors for the loans and then each of those investors was listed on the Notes and Deeds of Trust as beneficial owners of interests in the loans secured by the Deeds of Trust. The holders of the beneficial interests are referred to as "Direct Lenders." There are over 200 Direct Lenders holding different percentages of the loans to the three Castaic entities.

The loans purport to have been entered into in Nevada but the borrowers, Castaic Partners, were and are, California limited liability companies with their principal place of business in San Diego County. The property is all within Los Angeles County. A significant percentage of the Direct Lenders are California residents or entities, including, without limitation, IRAs or other pension plans. The Deeds of Trust are California forms and include specific provisions as to foreclosure issues that the transaction is governed by California law.

The loans were originally serviced by USACM but it ended up in bankruptcy and one of its principals went to jail for their wrongful and illegal action in making the loans. Its interests as a loan servicer have passed through several companies including, Compass FP, Silar Advisors, and Cross FLS ("Cross"). Each of the loan servicers purport to act under the "51% Rule" in Nevada that they contend gives them the right to decide the fate of the beneficial interests if 51% of the beneficial interests vote to act. (Request for Judicial Notice ("RJN"), Exhibit 1).

In or about 2007, Compass FP, allegedly acting on behalf of the Direct Lenders filed Notices of Default on the loans in California. No further action was ever taken on those Notices of Default by Compass FP. A tolling agreement was

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entered into at that time. The tolling agreement has since expired. Suits were filed in California seeking to enforce the guarantees of the loans. The California suits that were filed were ultimately dismissed. Those suits acknowledged that California law applied to the transactions. In the meantime, Compass FP lost its right to act as a servicer of the loan because it defaulted on obligations owed to its lender. That lender, Silar Advisors, foreclosed and assigned the servicing rights to Asset Resolution Company ("ARC"). ARC eventually filed bankruptcy and its servicing rights were ultimately terminated by the bankruptcy court. (RJN, Exhibit 2).

Thereafter, Cross claims that it became the loan servicer by a majority vote of the Direct Lenders. The vote was, and is, not valid and Cross was never validly acting as a loan servicer for this loan or authorized to act on behalf of the Direct Lenders. The assignors to Barkett and the entities of which he was a managing member never agreed to Cross acting as the loan servicer and no proper notice of that assignment was ever provided. (RJN, Exhibit 3).

In or about late 2011, Cross purported to conduct a vote under Nevada law pursuant to which the Direct Lenders were asked to agree to a transfer of their beneficial interests in the loans, and deeds of trust to Castaic Investors, LLC. In turn, Castaic Investors, LLC would become a member in DACA Castaic, LLC. Essentially, the agreement was to make the Direct Lenders members of an LLC and subordinate the interests of the Direct Lenders to other financing that might be advanced and to the claims of Debt Acquisition Corporation of America V that put the "deal" together. As this Court already ruled, no person can be compelled to become a member of a limited liability company. (Exhibit 10).

In order to obtain the "consent" of the beneficial interest holders, Cross and DACA Castaic, DACA V and Howard Justus, the principal of DACA V, represented to the Direct Lenders that on close of the Purchase Agreement, DACA V or Justus or some entity affiliated with them would advance the sum of up to $3.2 million to pay the past due property taxes on the land that was security for the

Castaic Partners and the Castaic Partners II notes. They also represented that they would advance monies to deal with litigation that was already filed by Barkett, one of the guarantors and the managing member of the entities. It was confirmed to the Direct Lenders that the Purchase Agreement transaction closed. Justus, as the agent of DACA V and DACA Castaic, also testified under oath in a bankruptcy proceeding involving Castaic Partners and Castaic Partners II that the Purchase Agreement had closed but the property taxes had never in fact advanced to DACA Castaic to cover the alleged property taxes. (RJN, Exhibits 4 & 6).

In the meantime, this Court held that no Direct Lender could be forced to transfer his or her beneficial interest in the note, deed of trust or guarantee to DACA Castaic, LLC and that DACA Castaic did not hold the interest of any person or entity that did not voluntarily transfer the interest to DACA Castaic. This court also held that the guarantee and the note/security interests could not be separated so to the extent that a transfer occurred by a beneficial interest holder to the new LLC, Castaic Investors, the entire interest was transferred. (Exhibit 10).

According to the filings by DACA Castaic under oath either in discovery or otherwise in the related matters, DACA Castaic does not own or control 100% of the beneficial interests in the Castaic Partners or Castaic Partners II loans. The vote was not valid and many of the persons or entities that Cross and DACA claim voted in favor of the transaction did not do so. The vote has never been audited or confirmed.

Despite that, DACA Castaic proceeded to record a Notice of Sale for the properties owned by Castaic Partners and Castaic Partners II with the sale initially scheduled for July 31, 2012. At no time did DACA Castaic seek or obtain the approval of the Direct Lenders to do so. Under California law, which governs the Deeds of Trust, in order for action to be taken there must be a Majority Action Affidavit. (Civ. Code section 2941.9). That is supposed to be filed when the loans are made but that did not happen here. The foreclosures ultimately took placed in

November of 2012 but it was not until July 2013 that Justus purported to file a Majority Action Affidavit. There is nothing to suggest that there was a vote to file a Majority Action Affidavit. (RJN., Exh. 5)

In response to the efforts of DACA Castaic to conduct a foreclosure sale, on or about July 30, Castaic Partners filed for protection under the Bankruptcy Act. On or about October 18, based on a motion filed by DACA Castaic, over the objection of Castaic Partners, the court granted relief from stay to DACA Castaic to foreclose on the properties. At no time was Barkett, his entities, or their assignor advised of the actions that were taken or advised that such actions could have a detrimental effect on the interests of Barkett and his entities or the assignor in the notes and deeds of trust. Barkett or his entities are the assignee of interests held by Direct Lenders who did not agree to the plan of DACA Castaic and did not agree to become members of the limited liability company. In addition, they did not consent or agree that its beneficial interests in the notes or the deeds of trust should be foreclosed on by DACA Castaic or anyone else.

In the bankruptcy filings by Castaic Partners, the entities have represented to the court that they have a completed application for development of the properties into a high end residential subdivision and that if the County of Los Angeles is in the process of amending its General Plan for this area to reduce the allowable density of development at this location. According to the information filed by DACA Castaic, the properties would be worth no more than $5 million if the planned zoning is not in place. That amount barely covers the property taxes that were due. However, according to Castaic Partners if they are permitted to complete the application as currently submitted, the properties should be worth no less than $35 million. (RJN, Exhibit 6).

With the foreclosure, DACA Castaic had to submit an entirely new application and will now be stuck with the lower densities with all chance lost to maximize the recovery for the benefit of the Direct Lenders, including Barkett and

his Castaic entities.

II.

DACA's MOTION FOR DEFAULT JUDGMENT AND SUMMARY JUDGMENT IS PROCEDURALLY INADEQUATE

Under Nevada Local Rule LR 7056 it is *mandatory* to file a Separate Statement of Material Facts. However, DACA failed to do so. One was not served upon the Barkett Parties, nor does a review of the Docket online show that one was filed. (Exhibit 7). Therefore, the Court should deny DACA's motions until such time as they are filed properly.

III.

DEFAULT JUDGMENT ON DACA'S COUNTERCLAIM IS NOT PROPER

A. Motion to Set Aside the Default

Default judgment is improper. Under Federal Rules of Civil Procedure 55 and 60(c), the defaulting party has a reasonable amount of time, but not more than one year, to seek a motion to set aside the default. It this case it has been only six months, well within the time allowed.

The Barkett Parties answer was stricken and default entered because of difficulty finding new local counsel. The answer was filed in a timely matter. The Barkett Parties were represented by counsel admitted pro hac vice at all times. Original local counsel substituted out of the case. However, because of the vast number of parties in this case, it was difficult to find new local counsel to associate into the case. While new counsel was not found by the deadline sought by the court, the search continued, new counsel was associated in prior to the Court's order on the motion to strike, but the answer was stricken anyway. (Exhibit 8).

The Barkett Parties are still represented by local and pro hac vice counsel. A fundamental principle in the law is that the issues should be decided on their merits. In light of this principle, and the pending motion to set aside the default, entry of a default judgment would be inappropriate.

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B. Relief Exceeds in Amount the Demand in the Pleadings

The relief for default judgments is limited in scope. It "must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. Rule Civ. Pro. 54(c); *Ferrara v. CMR Contracting LLC,* 848 F.Supp.2d 304, 311 (ED NY 2012) (damages recoverable by default judgment limited to type and quantity of damages demanded in the complaint). This assures the "fundamental fairness" required by due process of law. It would be unfair to allow a plaintiff to obtain different relief than that for which he prayed.

In its proposed judgment sections 2.1 and 2.5, DACA seeks the court to declare that:

2.1 The [Tapia Ranch Loan]…is in default. The amount owing under the Castaic II Note, after deducting the credit bid of $2,000,000.00 made at foreclosure sale is $98,760,338.22 as of November 1, 2013 and shall increase by an additional $54,866.85 per diem thereafter until the date of entry of this Judgment.

2.2 …

2.3 The [Castaic II Loan] … is in default. The amount owing under the Castaic II Note, after deducting the credit bid of $500,000.00 made at foreclosure sale is $23,801,458.04 as of November 1, 2013 and shall increase by an additional $13,223.03 per diem thereafter until the date of entry of this Judgment.

2.4 …

2.5 The [Castaic III Loan] … is in default. The amount owing under the Castaic III Note is $21,004,165.34 as of November 1, 2013 and shall increase by an additional $11,668.98 per diem thereafter until the date of entry of this Judgment.

The amounts in DACA's proposed judgment are not the amounts prayed for in the counterclaim. DACA originally prayed for relief in the sums of: $70,592,147.00 with $38,681.00 interest per diem for the Tapia Ranch Note; $16,898.00 with $9,264.00 interest per diem for the Castaic II Note; and $15,536,109.00 with $8,513.00 inter per diem for the Castaic III Note. DACA is

seeking over $41,000,000.00 more than before, along with grossly increased interest amounts per diem. DACA's proposed default judgment far exceeds in amount that which was demanded in the pleadings. Therefore, default judgment should not be entered. (Exhibits 8, 9).

C. Validity of the Purchase Agreement

The validity of the Purchase Agreement is a genuine issue of material fact to be determined at trial. In the 3/14/12 Order the Court ruled "that the Purchase Agreement was approved by a majority interest in the loans… ." However, in its same order the Court stated that which direct lenders made an assignment remains a question of fact. The two concepts are contradictory, DACA cannot establish that a majority approved the Purchase Agreement when the quantity of assignments is unclear. (Exhibits 8, 10).

D. Validity of the Pending foreclosures

The validity of the foreclosures is also a genuine issue of material fact to be determined at trial. The Court's 3/14/12 Order is again contradictory. It states that it remains a question of fact which direct lenders made an assignment, but then states foreclosures were proper. (Exhibits 8, 10). Without an established majority of assignments, DACA did not have authority to initiate the foreclosure sales. Without such authority the foreclosures are void.

Further, as DACA explains in their own memorandum of points and authorities, the balance of the Castaic Notes is relevant to determine the approximate balance of the Notes at various times in order to establish the validity of the foreclosure notices, which are required under California Civil Code Section 2924 to set forth a "good faith estimate" of the amount secured by the trust deed. However, if the balances have yet to be decided, there can be no good faith estimate. The material fact of the good faith estimate remains, and the notices cannot yet be validated.

E. Reconsideration or Clarification of Ruling Beyond Scope of Relief Demanded in Pleading

DACA suggests the Court reconsider or clarify its ruling on the effect of the Cross assignment on the interests of Direct Lenders not affirmatively voting to approve the Purchase Agreement, and determine to what extent the guaranty rights of the non-consenting Direct Lenders have also been assigned to DACA. The Court has already ruled on this point. In the Court's 3/14/12 Order, it ruled that the majority cannot transfer the minority's interests involuntarily. (Exhibits 8, 10). Also, DACA's original pleading does not pray for such relief making in improper for default judgment.

Additionally, DACA cites to a variety of prior cases to establish that the 3/14/12 Order is inconsistent with prior orders approving note sales based upon the 51% Rule. However, in the Harbor Georgetown case cited all 67 votes were in favor of the sale. There were no "no" votes. That is not the case here. The Barkett Parties, and other such as the McKnights and Kapps opposed the sale. Without an audit, it is impossible to know who else opposed the sale.

In the Comvest case cited, the Court merely approved the sale of the specific interest under the care of the trustee. No part of the order give the trustee any authority to sell any other beneficiary interest holder's interest.

Next, DACA believes the portion of the 3/14/12 Order addressing the effect of the Purchase Agreement, and trust deed assignments on those Direct Lenders constituting a minority interest, was intended to protect the minorities' rights. Specifically, DACA wants the Court to modify its order to state that the 51% rule allows the assignment of 100% interest in fractionated notes and trust deeds upon a majority vote, making DACA the sole beneficiary under the Castaic Trust Deeds. However, this does not protect the minority. It strips them of their beneficiary interest in the notes and deeds and subordinates their interests without their consent. Moreover, since the wrongful foreclosures already took place, and if

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they were valid, the non-consenting Direct Lenders lost all of their collateral interests and have no right to any deficiency against the entities. Code of Civil Procedure Section 580b prohibits any deficiency judgment after the sale of property under a purchase money mortgage or deed of trust and places the full risk of inadequate security on the purchase money lender (trust deed beneficiary). Cal. Code Civ. Pro. § 580b; *American Sav. & Loan Asso. v. Leeds*, 68 Cal. 2d 611, 615 (1968) citing *Bargioni v. Hill*, 59 Cal.2d 121, 123 (1963), *Roseleaf v. Chierighino*, 59 Cal.2d 35, 42; *Brown v. Jensen*, 41 Cal.2d 193, 197-198 (1943).]. If the guarantees also went to DACA they also lost the right to sue on those guarantees. It should also be noted that at least one party, McKnight has a judgment on a guarantee claim that, if DACA is right, never belonged to McKnight.

DACA acknowledges a continuing fiduciary duty to all Castaic Direct Lenders although it expressly disclaimed being a loan servicer in its bankruptcy filings. (Exhibits 2 & 5). DACA alleges it will distribute funds to all Direct Lenders regardless of whether they actually became members of Castaic Investors, LLC. It fails to point out that those payments will be made only after it gets its fees, gets its loans repaid and all the legal fees are paid. The Direct Lenders never had that explained to them before the alleged "vote" was taken. Moreover, DACA still purports to control all the decisions without regard to the claims or interests of the non-consenting Direct Lenders. This still divests the minority interest holders of their right to control their own property interest. If DACA succeeds on its motion, in order to have any say in the disposition of the property the minority must become a member of Castaic Investors, LLC. It will be their only option. While membership is not mandatory or automatic, any desire to retain one's property rights will require membership. This is directly contradictory to the 3/14/12 Order in which the Court clearly states that "the majority could not transfer the minority's interest involuntarily, it could elect to transfer its own interests, to service the loan, to foreclose, or to otherwise manage the loan without the permission of minority

interests." (Exhibits 8, 10).

Therefore, the default judgment should not be entered.

IV.

THE COURT SHOULD NOT GRANT DACA'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment under Federal Rule of Civil Procedure 56 must be denied where there is a dispute as to the facts of the controversy or the inferences that may be drawn from those facts. See *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am., Inc., 222 F.3d 123, 129 (3d Cir. 2000). There is an issue for trial if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In deciding a summary judgment motion, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-150 (2000). The burden of persuasion on a party moving for summary judgment "is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted." *Fagan v. Nordic Prince, Inc.,* CIV.A. 91-5143, 1992 WL 361704 (D.N.J. July 17, 1992).

At the summary judgment stage, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

Additionally, in determining summary judgment, a court uses a burden-shifting scheme:

> When the party moving for summary judgment would bear the burden of proof at trial, it must come with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact of each issue material to its case. *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations and internal quotations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence.

B. Summary Judgment on DACA's Supplemental and Fourth Party Complaint Is Improper

1. Validity of the Foreclosures

a. The November 2012 Foreclosure Sales are Void, Not Valid

Under California law, a trustee's sale under a deed of trust is subject to a rebuttable presumption of validity only if the sale is voidable, not void.

A voidable foreclosure sale requires evidence of irregularities in the sale process. In a voidable sale, once a trustee's deed reciting that all legal notice requirements have been satisfied has been transferred to a buyer at a foreclosure sale, the sale can be successfully attacked on the grounds of procedural irregularity only if the buyer is not a bona fide purchaser. See *Moeller v. Lien,* 25 Cal.App.4th 822, 831 (1994).

A void foreclosure sale creates no presumptions in favor of the

purchaser at a trustee's sale. And recitals in a trustee's deed regarding notices are irrelevant when the sale is void. *Bank of America v. La Jolla Group II*, 129 Cal.App.4th 706 (2005) , found that in a void sale:

"The sale was improper because ... the beneficiary had no right to exercise the power of sale. No statute creates a presumption-conclusive or otherwise-for any purchaser-bona fide or otherwise—that any recitals in a trustee's deed render effective a sale that had no contractual basis." *Id.* at 714.

As to a buyer who is not a bona fide purchaser, such as the beneficiary buying at sale by way of a credit bid, there is only a rebuttable presumption regarding the recitals in the trustee's deed regarding notice. This presumption can be overcome by a showing of irregularities in the required notices. *Wolfe v. Lipsy* 163 Cal. App. 3d 633, 639 (1985) concluded: "...its effect is merely to provide prima facie proof of the particular facts that the sale was conducted regularly and fairly, until contradicted and overcome by other evidence [cites omitted]."

And, although Civil Code 2924 sets forth a presumption that the notices required prior to the conduct of the sale were properly provided if the trustee's deed states that they were properly given, these presumptions only apply to the notice provisions, not to other defects in the foreclosure process. *Bank of America v. La Jolla Group II,* 129 Cal.App.4th 706, 714 (2005), finding that the provisions in question establish presumptions only about the adequacy of notices related to a foreclosure sale:

> "Miller and Starr assert that '[t]he statutory presumption [created by section 2923] only applies to the propriety of the required notes, [and] it does not apply to other requirements of the foreclosure process.'

In the instant case, like in *Bank of America*, the sale was improper because DACA did not have the authority to initiate the foreclosures. In the Purchase Agreement, Cross attempted to transfer to DACA 100% of the beneficiary interests in the Castaic loans. Cross did not have the authority to transfer 100% of

the interests. (RJN, Exhibit 11). In the Court's 3/14/12 Order it ruled that the majority could not transfer the minority's interest involuntarily. (Exhibits 8, 10). This makes the Purchase Agreement, assigning away the minority's interest, invalid. Therefore, the sales are void, and there is no presumption that the sales were conducted regularly and properly.

The Court also noted that which direct lenders made assignments remains a question of fact. (Exhibits 8, 10). Even DACA, in its motion, is seeking clarification of what was transferred and the transfers effects on the minority holders of beneficiary interests. DACA has presented nothing that would cure this defect. Therefore it is clear material questions of fact remain.

b. <u>A Majority Action Affidavit Is Required, Defect Not Cured</u>

DACA asserts that because in July 2013 Mr. Justus filed a Majority Action Affidavit with a list of Direct Lenders the foreclosure is not void. However, there has been no certification or audit of the vote count. (Exhibit 8). DACA is asserting it has a majority, but the Court stated which lenders assigned to DACA was a remaining question of fact, and DACA has even raised the question as to what interest the Barkett Parties hold. Given such uncertainty, a determination of majority is not possible, and remains a question of fact to be determined

DACA also ignores the fact that to be valid a Majority Action Affidavit has to be done at the time the loan was made. In this case, DACA seeks to do the Affidavit after it purported to rely on the Nevada rule, foreclosed and now essentially seeks ratification. The statute provides for agreements in advance, not ratification after the fact. DACA has put forth no evidence to show that the holders agreed to the Affidavit. It fails to explain how it could have any efficacy at this point.

2. <u>The Barkett Parties have the Right to Set Aside the Foreclosures</u>

A suit in equity to set aside a foreclosure sale is the traditional method by which a nonjudicial foreclosure sale is challenged. The party seeking to set aside

the sale has the burden of pleading and proof at trial of improper procedure and consequent prejudice. *Anderson v. Heart Federal Savings & Loan Assn.*, 28 Cal.App.3d 202, 209-10 (1972).

Nonetheless, in a summary judgment proceeding the burden is on the moving party defendant to show that there is no triable issue of material fact with respect to matters put in issue by the complaint and that the facts adduced in the summary judgment proceeding entitle the defendant to a judgment as a matter of law. *Id.* at 210; Cal. Code Civ. Pro. § 437c(c).

DACA has failed to meet this burden. It has not established an audited or certified majority vote for the Purchase Agreement, which remains in question. Therefore it cannot establish its authority to initiate the foreclosure sales. DACA purported to foreclose as the owner of 100% of the beneficial interests even though it knows that the Court has held otherwise. The Direct Lenders who did not agree to become members of the Castaic Investors, LLC presumably still owned their beneficial interests in the deeds of trusts at the time of the foreclosures. They are now tenants in common as owners in the properties but DACA is acting as if it controls the disposition of the property. In reality, DACA had no authority to foreclose and take title in the name of DACA as to the non-consenting Direct Lenders and therefore the sales are void, tender is not required, and summary judgment should be denied.

3. <u>The Barkett Parties Do Hold Any Direct Lender Interests.</u>

There is a material question of fact as to what Direct Lender Interests the Barkett Parties hold. In his declaration in the Castaic Partners bankruptcy case, Mr. Barkett testified that "Either I or entities of which I am the managing member, including Pond Avenue Partners, have acquired beneficial interest in the Castaic Partners note and deed of trust and in the Castaic II Partners deed of trust. I have also through the Castaic entities take defaults against beneficial owners in the Los Angeles superior court action. Between the purchases and defaults, either I or

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entities that I manage own approximately 50% of the beneficial interest in the notes secured by the deed of trust." Those defaults were entered in a case pending in Los Angeles and have never been set aside. While the case is stayed, the defaults remain effective and in place. DACA tries to ignore the effect of those defaults.

In deciding a summary judgment motion, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).

The Barkett Parties hold Direct Lender interests. DACA concedes in its memorandum of points and authorities (p. 27) that interests were assigned. Indeed, Castaic Investors sent tax documents to Barkett relating to those very assignments and cannot deny their existence now.

However, DACA then relies on the Response to Special Interrogatory No. 5 to assert that no interests are held. The specific quote DACA cites states: "Neither Barkett personally, Merjan Financial or the Castaic entities (except by the defaults) hold any Tapia Direct Lender Interests." The answer was the same with reference to the other loans. It is clear. The answer was not that they hold no interests. It clearly says "except by the defaults". The Barkett Parties have always represented they own interest in the loans. Despite the fact that DACA requests summary judgment consistent with the interrogatory answers, the result is the same, the Barkett Parties maintain ownership of Direct Lender interests.

C. Summary Judgment on the Third Party Complaint and Counterclaim of William Barkett, et al, is Improper

Summary Judgment should not be granted as to the Barkett Party claims. DACA's sole argument is if their default judgment is granted, none of the relief sought against DACA may be granted. However, the relief sought by default judgment greatly exceeds the scope of what prayed in DACA's complaint and must be denied. Therefore, relief cannot be granted on default judgment.

DACA fails to establish, alternatively, that there are no triable questions of material fact for the Barkett's Third Party Complaint and Counterclaim. Therefore, summary judgment should be denied.

V.

CONCLUSION

For the reasons stated above, the Barkett Parties request that DACA's motion for default judgment and summary judgment be denied.

September ___, 2013

Respectfully submitted,

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